A

Jee Chai Foo v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05–47 OF 2011
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
30 JUNE 2014

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Murder — Penal Code — s 302 — Pub owner murdered by appellant and a group of attackers — Appellant slamming chair at back of deceased's head — Contents of police report made by wife of deceased and medical examination report materially inconsistent — Material inconsistency not sufficiently considered by trial judge — Failure to properly consider defence — Whether misdirection warranting appellate intervention — Failure to prove beyond reasonable doubt that injuries inflicted on deceased were sufficient in the ordinary course of nature to cause death — Conviction and sentence quashed and substituted with offence of culpable homicide not amounting to murder

D

E

The appellant was charged under s 302 of the Penal Code ('the PC') for the offence of murdering of one Neward ak Sadat ('the deceased'). The deceased was a pub owner. The deceased and his son ('PW1') were attacked by a group of attackers on the ground floor of the pub. According to PW1, the appellant was negotiating with the deceased for an increase in the amount of protection

F

money since the deceased was expanding his business to the upper floor. A fight broke out and the appellant push the deceased to the ground. PW1 then saw the appellant slamming a chair at the back of the deceased's head. PW1 was also attacked and he blacked out. PW6 who was employed as a deejay at the pub testified that he saw a fight between the deceased and some of the customers,

G

one of whom was the appellant. PW6 said he saw the appellant slam the deceased with a chair. PW7, the wife of the deceased testified that she heard loud noises from downstairs and went down where she saw her husband lying motionless on the floor with blood on his body. The post-mortem showed that the cause of death was due to head and chest injuries inflicted by blunt force

H

trauma. The learned High Court judge ('the judge') found the appellant guilty and sentenced him to death. The appellant appealed against conviction and sentence on the ground that the judge had erred in accepting the testimonies of PW1, PW6 and PW7 at face value without any evaluation. PW7 in her police report (exh D1) stated that the fight happened outside the pub. In

I

re-examination, PW7 attempted to explain that she was in a state of panic when she lodged the report. Further, the prosecution had tendered a medical examination report (exh P5) where the investigating officer ('PW13') who prepared a brief fact of the police investigation stated that the incident was 'pergaduhan di luar karoke berkenaan'. The appellant also claimed that the

injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause death.

Held:

(1) The content of exhs D1 and P5 was materially inconsistent with the evidence of PW1 that the deceased was attacked by the appellant with a chair inside the pub. The judge never addressed or commented on this issue in his judgment. Once the material inconsistency had been placed, there was a statutory duty cast on the judge to make a specific finding of facts on the material discrepancy issue raised by the appellant. This was never sufficiently considered by the judge and he failed to direct his mind on this point. The failure to take the evidence regarding the material discrepancy into consideration amounted in effect to a failure to consider a defence which had been put forward (see para 16).

(2) The judge had a duty to consider the evidence in its entirety, including the evidence of the prosecution which favoured the appellant. It was the duty of the judge to consider that defence, no matter how weak it may be. This was a serious non-direction which amounted to a misdirection, warranting appellate intervention. The judge misdirected himself in that he overlooked and failed to appreciate the importance of this issue as it could consequently raise a reasonable doubt on the prosecution's case (see para 16).

(3) The judge had incorrectly disallowed the question as to whether the injuries inflicted upon the deceased were sufficient in the ordinary course of nature to cause death. The medical evidence to the questions posed by the learned DPP had a bearing on whether the actus reus and the mens rea which caused the death of the deceased fell within the ambit of s 299 of the PC or under any of the four limbs provided for by paras (a)–(d) of s 300 of the PC. This was important to determine whether the offence committed by the appellant fell within the offence of murder under s 302 of the PC or it fell within the offence of culpable homicide not amounting to murder under s 304 of the PC. Therefore, it was not proved beyond reasonable doubt that those injuries were sufficient in the ordinary course of nature to cause death within any one of the four limbs provided for by paras (a)–(d) of s 300 of the PC. Hence, this was a case which could be reasonably brought within the lesser offence of culpable homicide not amounting to murder under s 304(b) of the PC (see para 20).

(4) The conviction and the death sentence was quashed and substituted with a lesser offence of culpable homicide not amounting to murder under s 304(b) of the PC. The appellant was sentenced to ten years imprisonment from the date of arrest (see para 21).

[Bahasa Malaysia summary

Perayu telah dituduh di bawah s 302 Kanun Keseksaan ('KK') kerana kesalahan membunuh Neward ak Sadat ('si mati'). Si mati adalah pemilik pub. Si mati dan anak lelakinya ('PW1') telah diserang oleh sekumpulan penyerang di tingkat bawah pub itu. Menurut PW1, perayu sedang berunding dengan si mati untuk menaikkan jumlah wang perlindungan kerana si mati telah mengembangkan perniagaannya ke tingkat atas. Pergaduhan berlaku dan perayu telah menolak si mati ke tanah. PW1 kemudian melihat perayu menghempas kerusi di belakang kepala si mati. PW1 juga diserang dan dia pengsan. PW6 yang bekerja sebagai deejay di pub itu memberi keterangan bahawa dia melihat pergaduhan antara si mati dan beberapa pelanggan, salah seorangnya adalah perayu. PW6 berkata dia melihat perayu menghentak si mati dengan kerusi. PW7, isteri si mati memberi keterangan bahawa dia mendengar bunyi kuat dari tingkat bawah dan turun ke bawah di mana dia melihat suaminya terbaring tidak bergerak di atas lantai berlumuran darah di badannya. Bedah siasat menunjukkan bahawa sebab kematian adalah akibat kecederaan di kepala dan dada yang disebabkan oleh trauma benda tumpul. Hakim Mahkamah Tinggi ('hakim') mendapati perayu bersalah dan menjatuhkan hukuman mati ke atasnya. Perayu merayu terhadap sabitan dan hukuman itu atas alasan bahawa hakim terkhilaf dalam menerima keterangan PW1, PW6 dan PW7 dengan begitu sahaja tanpa apa-apa penilaian. PW7 dalam laporan polisnya (eksh D1) menyatakan bahawa pergaduhan berlaku di luar pub itu. Dalam pemeriksaan semula, PW7 telah cuba menjelaskan bahawa dia dalam keadaan panik apabila membuat laporan. Selanjutnya, pendakwaan telah menenderkan laporan pemeriksaan perubatan (eksh P5) di mana pegawai penyiasat ('PW13') yang menyediakan fakta ringkas tentang siasatan polis menyatakan bahawa kejadian itu adalah 'pergaduhan di luar karoke berkenaan'. Perayu juga mendakwa bahawa kecederaan yang dialami oleh si mati tidak mencukupi dalam keadaan biasa yang menyebabkan kematian.

Diputuskan:

(1) Kandungan ekshs D1 dan P5 adalah tidak konsisten langsung dengan keterangan PW1 bahawa si mati telah diserang oleh perayu dengan kerusi dalam pub itu. Hakim tidak mengemukakan atau membuat komen tentang isu ini dalam penghakiman beliau. Jika ketidakselarasan ketara ditunjukkan, terdapat kewajipan statutori yang terletak pada hakim untuk membuat penemuan fakta yang spesifik berhubung isu penting yang bercanggah yang ditimbulkan oleh perayu. Ini tidak dipertimbangkan dengan mencukupi oleh hakim dan beliau telah gagal untuk mengarahkan mindanya berhubung perkara ini. Kegagalan untuk memberi pertimbangan tentang keterangan berhubung percanggahan material dianggap kegagalan untuk mempertimbangkan pembelaan yang telah dikemukakan (lihat perenggan 16).

(2) Hakim mempunyai kewajipan untuk mempertimbangkan keterangan secara menyeluruh, termasuk keterangan pendakwaan yang menyebelahi perayu. Adalah kewajipan hakim untuk mempertimbangkan pembelaan tersebut, tanpa mengira jika ia tidak begitu kukuh. Ia adalah satu ketiadaan arahan yang serius yang merupakan salah arahan, dan mewajarkan campur tangan mahkamah rayuan. Hakim telah tersalah arah dirinya sendiri di mana beliau terlepas pandang dan gagal untuk memahami kepentingan isu ini kerana ia boleh akhirnya menimbulkan keraguan munasabah ke atas kes pendakwaan (lihat perenggan 16).

(3) Hakim terkhilaf kerana tidak membenarkan persoalan tentang sama ada kecederaan yang dialami si mati mencukupi dalam keadaan biasa yang menyebabkan kematian. Keterangan perubatan berhubung persoalan-persoalan yang dikemukakan oleh timbalan pendakwa raya yang bijaksana mempunyai kaitan tentang sama ada actus reus dan mens rea yang menyebabkan kematian si mati terjatuh dalam skop s 299 KK atau di bawah mana-mana empat cabang yang diperuntukkan oleh perenggan-perenggan (a)–(d) kepada s 300 KK. Ini adalah penting untuk menentukan sama ada kesalahan yang dilakukan oleh perayu terjatuh dalam kesalahan membunuh di bawah s 320 KK atau ia terjatuh dalam kesalahan homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304 KK. Oleh itu, ia tidak boleh dibuktikan melampaui keraguan munasabah bahawa kecederaan tersebut adalah mencukupi dalam keadaan biasa yang menyebabkan kematian dalam mana-mana satu daripada empat cabang yang diperuntukkan oleh perenggan-perenggan (a)–(d) kepada s 300 KK. Justeru, ini adalah kes yang wajar dimulakan dengan kesalahan homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(b) KK (lihat perenggan 20).

(4) Sabitan dan hukuman mati telah dibatalkan dan digantikan dengan kesalahan yang lebih ringan iaitu homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(b) KK. Perayu telah dihukum sepuluh tahun penjara dari tarikh tangkapan (lhat perenggan 21).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15, FC (refd)
Er Ah Kiat v PP [1965] 2 MLJ 238, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 2 AMR 1135, SC (refd)

A *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
B *PP v Mok Kar Poh* [2001] 1 AMR 1200, HC (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)

Legislation referred to

C Criminal Procedure Code s 180(1), (4)
Penal Code ss 299, 300, 300(a), (b), (c), (d), 302, 304, 304(b) , 324

Appeal from: Criminal Trial No 45–4 of 2009 (High Court, Kuching)

Anthony Tai (Anthony Tai) for the appellant.
D *Mahadhir bin Mohd Khairudin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Azahar Mohamed JCA (delivering judgment of the court):

E

[1] In the High Court at Kuching, Jee Chai Foo ('the appellant') was charged and tried for two offences.

[2] First was the offence of murder under s 302 of the Penal Code for causing
F the death of one Neward ak Sadat ('the deceased') with eight others still at large, at a place called Barukh Kulo Karaoke & Pub ('the pub'). The charge reads:

> That you and 8 others who are still at large on 4th day of January, 2009, at about 2.15 a.m. at Barukh Kulo Karaoke & Pub, No. 55, Lot 55, Lot 2565, Block 218, Ground Floor, 3rd Mile Shophouse, Jalan Keretapi, Kuching, in the District of
G Kuching, in the State of Sarawak, in furtherance of the common intention of you all, did commit murder by causing the death of one Neward Anak Sadat KPT: 591009136017, and that you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same Code.

H **[3]** The second charge was under s 324 of the Penal Code for voluntarily causing hurt to Felix ak Neward ('PW1') also with eight others still at large. The charge reads:

> That you and 8 others who are still at large on 4th day of January, 2009, at about 2.15 a.m. at Barukh Kulo Karaoke & Pub, No. 55, Lot 55, Lot 2565, Block 218, Ground Floor, 3rd Mile Shophouse, Jalan Keretapi, Kuching, in the District of
I Kuching, in the State of Sarawak, in furtherance of the common intention of you all, had intended to voluntarily causing grievous hurts to Felix Anak Neward, KPT: 870111136697 with weapons, to wit, metal chair, knife and wooden plank, and that you have thereby committed an offence punishable under section 324 of the

Penal Code read with section 34 of the same Code.

[4] The two charges were tried at one trial before the learned High Court judge given that both the offences were said to have been committed in one series of acts so connected together as to form the same transaction, in which the deceased together with PW1 were attacked by a group of attackers at the place and time as particularised in the charges.

[5] At the end of the trial, the learned High Court judge found the appellant guilty of both the charges and the appellant was convicted in respect of both the charges. For the first charge, the appellant was sentenced to death whilst for the second charge, he was sentenced to a term of imprisonment of one year, which is to run from his date of arrest, 14 January 2009. The appellant then appealed to this court against the decision of the learned High Court judge.

[6] When this appeal came up before us, we noted that the appellant did not pursue with the appeal in respect of the conviction and sentence for the charge of voluntarily causing hurt under s 324 of the Penal Code. We therefore affirmed the conviction for the said offence and the term of imprisonment of one year. The focus of our judgment is therefore on the murder charge.

[7] PW1, who is the son of the deceased, was one of the most important witnesses for the prosecution. According to the prosecution, PW1 gave an eyewitness account of the incident. In his evidence, PW1 described the sequence of events that led to the fatal injuries sustained by the deceased. He testified that at the material time, he was on the ground floor of the pub when the incident happened. At that moment, he was helping the deceased, who was the owner of the pub. He saw the deceased having a negotiation with the appellant for an increase in the amount of protection money since the deceased was expanding his business to the upper floor. The appellant's friends, seven of them, were also there. According to PW1, they were carrying 'senjata tapi di sembunyi di bahagian belakang'. As events unfolded, PW1 saw the appellant push the deceased to the ground. In his evidence, PW1 described what happened after he had intervened:

Q: Then?

A: Saya bercakap dengan Ah Foo. Saya bercakap, 'Apa tolak saya punya boss' dan Ah Foo kata 'Lu mau apa?', saya cakap 'Lu siapa?', Ah Foo terus menghayun senjata yang dipegang ke arah saya.

Q: What happen to you when he swing it?

A: Saya melindung muka dengan tangan. Selepas itu, kawan-kawan Ah Foo serang saya. Saya tengok bapa saya nak tolong saya, Ah Foo angkat kerusi dan hentak ke arah bapa saya.

[8] Continuing with his evidence, PW1 said that after the appellant slammed the chair at the back of the deceased's head, both he and the deceased were attacked by the appellant's friends. PW1 then blacked out but before he blacked out, he saw the appellant slammed the deceased with the chair twice. He subsequently found out that the deceased had died and he was himself hospitalised for four days at the Kuching General Hospital as a result of his injuries.

[9] Kakoh ak Kiles ('PW6') who was employed as a deejay at the pub testified that he saw a fight between the deceased and some of the customers, one of whom was the appellant. PW6 said he saw the appellant slammed the deceased with a chair. He testified that more than six others were involved in the fight and subsequently, he saw the deceased unconscious whilst PW1 semi-conscious. PW6 together with other workers of the pub took the deceased to the hospital and was told later that the deceased had passed away.

[10] The prosecution also called Noieb ak Jihep ('PW7'), the wife of the deceased and the mother of PW1 to testify during the trial. She said that at the material time after hearing loud noises from downstairs, she went down and saw her husband lying motionless on the floor with blood on his body and that PW1 was also lying unconscious on the floor.

[11] A post-mortem on the deceased was performed by Dr Norliza bt Ibrahim ('PW12'), a forensic medicine specialist. PW12 stated in her post-mortem report, exh P32, among others, that there were numerous injuries to the deceased's head, neck, arms, right leg, depressed circular fracture to the skull and bleeding in the brain, fracture of some of the ribs, internal bleeding in the chest and collapse of the right lung. PW12 certified that the cause of death was due to head and chest injuries inflicted by blunt force trauma.

[12] In finding that the prosecution had established a prima facie case against the appellant, the learned High Court judge said that the death of the deceased was clearly established by credible evidence of several witnesses not least the evidence of PW7. According to the learned High Court judge, eyewitness accounts were given by PW1 and partly by PW6 that the appellant and his friends had attacked and beaten the deceased with various weapons, including in particular exhs P6 (chair) and P7 (wood).

[13] By virtue of s 180(1) of the Criminal Procedure Code ('the CPC'), when the case for the prosecution is concluded, the court must consider whether the prosecution has made out a prima facie case against the accused. Section 180(4) provides that a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

It is a trite principle of law that a maximum evaluation of the credibility of the witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out (see *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457). What amounts to maximum evaluation? It is the assessment process for the essential purpose of analysing the credibility and reliability as well as trustworthiness of the evidence of the prosecution. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation; any evidence which is not safe to be acted upon should be rejected (per Vincent Ng J in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 and adopted by Zainun Ali J (as Her Ladyship then was) in *Public Prosecutor v Mok Kar Poh* [2001] 1 AMR 1200). In accord with the principle of maximum evaluation, a trial court is required to test the evidence of a witness from all angles and to test its reliability and credibility by taking into account the entire evidence placed before the court. The evidence must not be accepted at face value but has to be tested and evaluated to ascertain whether it suffers from any infirmities, gaps and contradictions before reliance can be placed on the particular evidence. It is also the duty of the trial court to consider the evidence which favours the defence. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution; if there is any such doubt there can be no prima facie case (per Augustine Paul JCA in *Balachandran v Public Prosecutor*). Judicial appreciation of evidence is at the heart and soul of dispensation of justice. On what constitutes judicial appreciation of evidence, it is apposite to bear in mind the following words of Gopal Sri Ram JCA (as he then was) in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97:

> A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

[14] This brings us to the principal submission of learned counsel for the appellant in this case. It was his argument that the learned High Court seriously erred when he accepted the testimonies of PW1, PW6 and PW7 at face value

without any evaluation, assessment or scrutiny and without ascertaining whether the testimonies in question suffer from any infirmities, gaps and contradictions. In this regard, learned counsel had taken us through the relevant part of the cross-examination of PW7:

Q: Adakah Puan pasti bahawa tiada pergaduhan lain berlaku selain dalam Barukh Kulo Karaoke & Pub?

A: Tidak ada.

Q: Pasti?

A: Pasti.

Q: Untuk pergaduhan di dalam Barukh Kulo Karaoke & Pub di mana suami dan anak Puan diserang, ada Puan buat laporan polis.

A: Ada.

Q: Bila Puan buat laporan polis tersebut?

A: Lepas saya hantar dia ke hospital, terus buat laporan polis.

Q: Adakah Puan setuju kalau saya kata Puan buat laporan polis dalam tempoh hari sama kejadian tersebut?

A: Setuju.

Q: Jika saya tunjuk laporan polis itu, dapat cam?

A: Dapat.

Q: Rujuk laporan polis tersebut [shows to PW7], adakah itu laporan polis yang Puan buat?

A: Ya, betul.

Q: Sudah baca polis report itu?

A: Ya.

Q: Setuju atau tidak laporan polis tersebut dibuat apabila perkara itu masih segar dalam fikiran Puan.

A: Setuju.

Q: Setuju atau tidak jika saya katakan bahawa apa yang kamu catit dalam laporan tersebut adalah perkara sebenar yang berlaku dalam kejadian tersebut?

A: Setuju.

Q: Tadi kamu mengatakan tidak ada berlaku pergaduhan di luar.

A: Ya.

Q: Kenapa dalam laporan polis kamu, kamu kata pergaduhan berlaku di luar Barukh Kulo Karaoke & Pub?

A: Tidak berlaku di luar, ia berlaku di dalam.

Q: Adakah Puan mengatakan bahawa apa yang dicatit dalam laporan polis tersebut tidak betul sedangkan Puan sendiri setuju dengan kandungannya.

A: Ini tidak benar sebab pergaduhan di dalam.

[15] Now, in the police report (exh D1) PW7 stated, among others, with the necessary emphasis, as follows:

> Pada 4/01/2009 jam lebih kurang 0215hrs bertempat di Barukh Kulo Karaoke Batu 3 Kuching telah berlaku sedikit pergaduhan *dekat luar karaoke berkenaan* yang melibatkan lebih kurang antara 7 ke-8 orang lelaki yang dikenali dan pada masa tersebut suami saya bernama Neward Anak Sadat telah cuba meleraikan pergaduhan tersebut tetapi mereka telah menyerang suami saya dengan menetak suami saya menggunakan parang, kayu, besi dan benda tajam. Akibat daripada kejadian tersebut suami saya telah mengalami kecederaan parah di bahagian kepala dan seluruh badannya. Manakala anak lelaki saya bernama Felix Anak Neward juga mendapati kecederaan di seluruh badan ....

[16] Although in re-examination, PW7 attempted to explain that she was in a state of panic when she lodged the report, exh D1 clearly disclosed that there was a fight outside the pub. And that as a result of the fight outside the pub, the deceased suffered grievous injury to the head and the whole body. More than that, in the course of the trial, the prosecution tendered a medical examination report, exh P5 (see 153 of the record of appeal, Vol 2). In that report, the investigating officer Inspector Gunong ak Bilan ('PW13') who prepared a brief fact of the police investigation stated that the incident was 'pergaduhan di luar karoke berkenaan'. Clearly, therefore, the content of exhs D1 and P5 is materially inconsistent with the evidence of PW1 that the deceased was attacked by the appellant with a chair inside the pub. Tellingly, however, the learned High Court judge never addressed or commented on this issue in his judgment. Once the material inconsistency had been placed, there was a statutory duty cast on the learned High Court judge to make a specific finding of facts on the material discrepancy issue raised by the appellant. This was never sufficiently considered by the learned High Court judge and he failed to direct his mind on this point. In our judgment, the failure to take the evidence regarding the material discrepancy into consideration amounted in effect to a failure to consider a defence which had been put forward (see *Er Ah Kiat v Public Prosecutor* [1965] 2 MLJ 238). The learned High Court judge has a duty to consider the evidence in its entirety, including the evidence of the prosecution which favours the appellant. It was the duty of the learned High Court judge to consider that defence, no matter how weak it may be. In our view, this is a serious non-direction which amounts to a misdirection, warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 2 AMR 1135). The learned High Court judge misdirected

himself in that he overlooked and failed to appreciate the importance of this issue as it could consequently raise a reasonable doubt on the prosecution's case.

[17] There is another reason why we took the view that the appellant's conviction for the charge under s 302 was wholly unsafe. Learned counsel for the appellant submitted that the injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause death. In this regard, the learned High Court judge had this to say:

> The numerous injuries inflicted on the deceased and the implements used to inflict those injuries led irresistibly to the inference that the common intention was to cause death.

[18] In the present case, the learned High Court judge failed to consider the fine distinction between ss 299 and 300 of the Penal Code. In *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15, the appellant was convicted by the High Court for the offence of murder under s 302 of the Penal Code. The appellant appealed to the Court of Appeal, which agreed with the findings of the trial judge and affirmed the appellant's conviction under s 302 of the Code. The appellant then appealed to the Federal Court. The main issue for the court's determination was regarding the question whether or not the evidence adduced by the prosecution had established that the appellant had the intention to kill the deceased. The Federal Court set aside the conviction of the appellant for the offence of murder, and substituted it with a lesser offence of culpable homicide not amounting to murder under the first part of s 304 of the Penal Code and was sentenced to a term of imprisonment of 20 years. Zulkefli CJ (Malaya) in delivering the judgment of the court explained the distinction between the provisions of ss 299 and 300 of the Penal Code to determine whether the offence committed by the appellant falls within the offence of murder under s 302 of the Penal Code or it falls within the offence of culpable homicide not amounting to murder under s 304 of the Penal Code:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that he is likely by such act to cause death.
>
> Section 300 of the Penal Code defines murder as follows: Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
> In the present case it is our view based on the nature of the injuries sustained by the

deceased there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. However, we do not agree with the finding of the learned trial judge that based on the nature and number of injuries, the appellant had the intention to cause death to the deceased. We noted that both the learned trial judge and the Court of Appeal in their decision did not address themselves on the fine distinction between ss 299 and 300 of the Penal Code before coming to a correct conclusion.

[19] In urging us to substitute the appellant's conviction with a lesser offence of culpable homicide not amounting to murder, learned counsel brought to our attention the following evidence of PW12 whilst being examined by the learned deputy public prosecutor ('the DPP'):

Q:	What was the cause of death?
A:	Sebab kematian adalah kecederaan kepala dan dada akibat trauma benda tumpul.
Q:	What were the chances of survival of the deceased when he sustained the fatal injuries?
Court:	Disallowed.
Q:	Apart from the fatal injuries sustained by the deceased were there any other causes which contributed to his death.
Court:	Disallowed.
Q:	Were the bodily injuries intended to be inflicted on the deceased sufficient in the ordinary course of nature cause death?
Court:	Disallowed.

[20] The learned High Court judge had, in our view, incorrectly disallowed the question as to whether the injuries inflicted upon the deceased were sufficient in the ordinary course of nature to cause death. In our view, the medical evidence to the questions posed by the learned DPP has a bearing on whether the actus reus and the mens rea which cause the death of the deceased fall within the ambit of s 299 or under any of the four limbs provided for by paras (a)–(d) of s 300 of the Penal Code. This is important to determine whether the offence committed by the appellant falls within the offence of murder under s 302 of the Penal Code or it falls within the offence of culpable homicide not amounting to murder under s 304 of the same Code. Therefore, in our judgment, it was not proved beyond reasonable doubt that those injuries were sufficient in the ordinary course of nature to cause death within any one of the four limbs provided for by paras (a)–(d) of s 300 of the Penal Code. Having regard to the facts of the case in its entirety, in our judgment, this is a case which can be reasonably brought within the lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code, which provides that whoever commits culpable homicide not amounting to murder

A shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

B **[21]** The upshot of all this is that the appeal in respect of the first charge was therefore allowed. Accordingly, we quashed and set aside the conviction and the death sentence of the learned High Court judge and we substituted it with a lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code. After taking into consideration the mitigation of the
C appellant and the submission of the learned DPP, the appellant was sentenced to ten years imprisonment from the date of arrest. This sentence is to run consecutively with the sentence of imprisonment of one year in respect of the second charge.

D *Order accordingly.*

Reported by Kanesh Sundrum

E

F

G

H

I